No. 14,395

IN THE

United States Court of Appeals

For the Ninth Circuit

CHARLES E. TOLIVER,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF.

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JURISDICTION.

Appellant was charged by Indictment filed in the United States District Court for the Northern District of California, Southern Division, within the jurisdiction of said Court, in First Count for violation of the Harrison Narcotic Act, 26 U.S.C. 2553, 2557, alleged to have been committed by Appellant in the City of Oakland, County of Alameda, State of California, on March 7, 1953; in Third Count, with violation of the Harrison Narcotic Act, 26 U.S.C. 2553, 2557, alleged to have been committed by Appellant in the City of Oakland, County of Alameda, State of California, on January 18, 1952; in Fourth Count, with violation of the Jones-Miller Act, 21 U.S.C. 174, alleged to have

been committed by Appellant in the City of Oakland, County of Alameda, State of California, on January 18, 1952; and in Fifth Count with conspiracy, 18 U.S.C. 371, alleged to have been committed by appellant in the Southern Division of the Northern District of California, the overt acts occurring on March 7, and March 11, 1953. (T.R. 2-6.)

The District Court had jurisdiction. 18 U.S.C., Sec. 3231; Rule 18, Federal Rules of Criminal Procedure.

Appellant was sentenced to be imprisoned and was fined $4.00 by final Judgment made and entered on March 26, 1954. (T.R. 15-20.)

Timely Notice of Appeal to this Court was filed March 26, 1954. (T.R. 21 and 22.) Rule 37a, Federal Rules of Criminal Procedure.

Jurisdiction of this Court to review the final Judgment of the District Court is found in 28 U.S.C., Sections 1291 and 1294.

ABSTRACT OF CASE.

Appellant Charles E. Toliver was convicted of two violations of the Harrison Narcotic Act, 26 U.S.C. 2553, 2557, found to have been committed on March 7, 1953 and January 18, 1952. He was also found guilty of a violation of the Jones-Miller Act, 21 U.S.C. 174, committed on January 18, 1952 and a violation of the conspiracy laws, the overt acts having occurred on March 7 and 11, 1953. (T.R. 2-6.)

The charges were that on the respective days, Appellant illegally sold, concealed or conspired to sell and conceal a quantity of heroin.

Appellant was found guilty on all counts. He was sentenced to prison for a 4 year period and was ordered to pay a fine of $1.00 upon each count, the said fines to be cumulative. The 4 year sentences upon Counts One and Three involving the two violations of the Harrison Narcotic Act, 26 U.S.C. 2553, 2557 were to run concurrently. The 4 year sentences upon Counts Four and Five involving violation of the Jones-Miller Act, 21 U.S.C. 174 and the conspiracy laws, 18 U.S.C. 371, were likewise to run concurrently one with the other, and consecutively to the previously described sentences for violation of the Harrison Act. (T.R. 15-17.)

The evidence relating to Counts Three and Four, violation of the Harrison Narcotic Act, 26 U.S.C. 2553, 2557, and violation of the Jones-Miller Act, 21 U.S.C. 174, alleged to have been committed on January 18, 1952 is that on that day between 6 and 8 o'clock, P.M., witness Abe Brown met Appellant at a club known as Payne's Corner, located at 7th and Center Streets, Oakland, Alameda County, California. Brown there arranged for and received from Appellant a package said by Appellant to contain "half a piece" or half an ounce of heroin for which Brown paid $200.00. (R.T. 22:9-25; 23:11-24; 24; 25:1-23; 53:14-20; 69:7-25; 76:15-25.)

The alleged narcotics was contained in a small white wax paper envelope which was handed by Ap-

pellant to Brown. About that time, Brown was illegally selling narcotics and this purchase was sold to his customers. Brown made no taste test to determine if it was heroin nor used none of it himself. Nor is there testimony that the narcotic was "bindle" wrapped as that expression is known to the illicit traffic. The only evidence that the substance handed by Toliver to Brown was in fact a narcotic is Brown's statement "Wasn't heroin I would have to give the people's money back" found on page 79, Reporter's Transcript, lines 23 and 24.

According to Brown and the jury, this is sufficient to prove that the narcotics was in fact sold and concealed. As will be developed subsequently, there are innocent inferences likewise deducible and inferible from this state of facts. The legal sufficiency of the evidence to support this essential element of the Government's case is obviously lacking and will be developed as the principal reason urged for the reversal of the Appellant's conviction upon Counts Three and Four.

The evidence relative to Indictment Counts One and Five is identical save one episode which occurred on March 11, 1953. In brief, witness Brown testified that he, informer Charles Haskell (R.T. 123:13) and Narcotics Agent Malcolm P. Richards went by auto to Payne's Place or Payne's Corner on 7th Street, Oakland, California, arriving at about 5:30 or 6:00 P.M. There, Brown had a conversation with Appellant Toliver. In it, Brown asked for "half a piece" or

half an ounce, and said that the people with him, Agent Richards and informer Charles Haskell wanted to meet him. Toliver replied it would do them no good as he was not dealing. (R.T. 28:13-25; 29:1-9.) Toliver then called over an unidentified man. In Brown's presence, he told this man of Brown's wishes. (R.T. 92:13-25; 93:1-16.) The unidentified man left, returned, and left again. (R.T. 93:17-25; 94:1-22; 95: 21-24.) In the meantime, Toliver and Brown again conversed about the unidentified man's whereabouts. (R.T. 31:1-16.) Toliver then permanently left the scene, although in a few minutes, the unidentified man returned to Payne's Place. He ordered Brown, Haskell and Agent Richards to follow him in their car to another location where delivery of the narcotics occurred. Toliver received no money, it being given to the unidentified man (R.T. 100:13-16) and he was not present when the narcotics were passed. (R.T. 98:11-18; 99:12-16.)

Several days later, Brown and Toliver casually met in a San Francisco gambling establishment known as Ernie's on Geary Street. There, Toliver told Brown that the man Brown had brought over to Oakland was a narcotic agent. (R.T. 33:10-25; 103:1-25; 104:1 and 2.) This meeting is referred to in the fifth count of the Indictment as Overt Act Number 2. (T.R. 6.)

Agent Malcolm P. Richards adds little to the legal sufficiency of the evidence against Toliver as to the episode of March 7, 1953. He had a conversation with Toliver wherein Toliver told him that he was not

handling the "stuff, himself, but that my boy was taking care of A.B." referring to witness Brown. (R.T. 125:1-4; 133:17-25; 134:1-14.) Later Toliver told Brown in the agent's presence that he would go and look for the unidentified peddler who had been missing from the scene for about 30 minutes. (R.T. 125:21-25; 126:1-6.) Agent Richards added that several days later at the Geary Street, San Francisco, bar he had a conversation with Appellant about narcotics and that Toliver told Richards not to talk to him about narcotics but to see the unidentified peddler and further that Toliver knew that Richards was in fact an agent. (R.T. 129:21-25; 130:1-14.)

Appellant took the stand in his own defense, He denied any narcotic transaction with A. B. Brown in January, 1952. (R.T. 154:10-25.) As to March 7, 1953, he admitted seeing A. B. Brown at Payne's Place, talking with him about narcotics and pointing out "Brother", a peddler, to Brown. (R.T. 155:1-25.) Toliver likewise admitted seeing Agent Richards at Ernie's, the San Francisco tavern, there having a conversation with him about narcotics (R.T. 160:5-21) and later that same day conversing with Agent Richards in Oakland. (R.T. 162:4-25; 163:1-3.)

During the trial, and also after conviction, but before judgment, Appellant moved the Court for a dismissal of Counts Three and Four of the Indictment which pertain to the episode of January 18, 1952, upon the grounds that the evidence was legally insufficient to support a conviction. Similarly, a

motion was made to dismiss the second overt act in Count Five, the conspiracy charge, on the grounds that the conspiracy had terminated prior to that date. Further, a motion was made to dismiss Count Five on the grounds that no date was therein specified, that particular count of the Indictment thus being uncertain. Motions as to the legal sufficiency of the evidence were likewise made as to Count One of the Indictment, which referred to violation of the Harrison Narcotic Act, 26 U.S.C. 2553, 2557, on March 7, 1953. All these motions were denied. The various specifications of errors relied upon by Appellant will detail these matters.

SPECIFICATIONS OF ERRORS.

1. The District Court erred when it denied Appellant's Motion to Strike Overt Act No. Two, of Count Five of the Indictment.

2. The District Court erred when it sentenced Appellant to serve a 4 year sentence of imprisonment upon Count One of the Indictment and a consecutive 4 year sentence upon Count Five thereof.

3. The District Court erred when it denied Appellant's Motion in Arrest of Judgment with respect to Count Five of the Indictment.

4. The District Court erred when it denied Motions to Acquit Appellant of Counts Three and Four of the Indictment.

5. The District Court erred when it denied Appellant's Motions for New Trial and Arrest of Judgment with respect to Counts Three and Four.

ARGUMENT.

1. APPELLANT'S 4 YEAR SENTENCE UPON COUNT FIVE OF THE INDICTMENT CONSECUTIVE TO COUNT ONE THEREOF IS DOUBLE PUNISHMENT FOR A SINGLE OFFENSE.

Specification of Error No. 1. The District Court erred when it denied Appellant's Motion to Strike Overt Act Two, of Count Five of the Indictment.

Overt Act Two was not an act to further the conspiracy, since at the time of its occurrence, the conspiracy had terminated. By overt act is meant an open act, done to effect the objects of the unlawful partnership, which act need not be itself a crime nor need it include the participation of all the criminal partners.

Pierce v. United States, 252 U.S. 240, 244, 64 L. Ed. 542, 546;

United States v. Rabinowich, 238 U.S. 78, 86, 59 L. Ed. 1211, 1214, 35 Sup. Ct. Rep. 682;

Rose v. United States, 149 Fed. 2d 755;

United States v. Schneiderman, 106 F. Supp. 906, 102 F. Supp. 87.

A conspiracy continues until its ends are accomplished or its abandonment is established or until a

conspirator by affirmative action undertakes some definite and positive action to withdraw therefrom.

United States v. Beck, 118 Fed. 2d 178;
Marino v. United States, 91 Fed. 2d 691;
11 *Cal. Jur.* 2d 230;
People v. Chait, 69 Cal. App. 2d 503;
Loser v. Superior Court, 78 Cal. App. 2d 30.

The sole reason for the requirement that an overt act be proved is to thereafter permit a conspirator to abandon his role in the conspiracy and avoid further legal penalty.

United States v. Britton, 108 U.S. 199, 204, 2 S. Ct. 531, 534, 27 L. Ed. 698;
Burk v. United States, 134 Fed. 2d 879, 882.

Assuming, arguendo, that a conspiracy in fact existed and that Appellant was a co-conspirator on March 7, 1953, the evidence is susceptible of the sole interpretation that by March 11, 1953, he had publicly renounced and abandoned his role therein, so that Appellant's Motion to Dismiss the Second Overt Act of Count Five of the Indictment ought to have been granted. (R.T. 33:10-25; 103:1-25; 104:1 and 2; 129: 21-25; 130:1-14; 160:5-21 and 163:1-3.)

Specification of Error No. 2. The District Court erred when it sentenced Appellant to serve a 4 year sentence of imprisonment upon Count One of the Indictment and a consecutive 4 year sentence upon Count Two thereof.

Identical evidence establishes the allegations in Counts One and Five of the Indictment. Thus, a

single offense has been committed which cannot be separated into two offenses so as to inflict double punishment upon Appellant. Identity of offenses is established by identity of parties, dates, time, etc., all of which are equal according to this evidence.

United States v. Katz, 271 U.S. 354, 70 L. Ed. 986;

Sealfon v. United States, 332 U.S. 575, 92 L.Ed. 180;

Pinkerton v. United States, 328 U.S. 640, 643, 90 L. Ed. 1489, 1494;

People v. Logan, 41 Cal. 2d 279, 289 and 290.

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2. BECAUSE COUNT FIVE OF THE INDICTMENT FAILS TO STATE THE DATE OF THE COMMENCEMENT OR THE DURATION OF THE THEREIN ALLEGED CONSPIRACY, APPELLANT'S MOTION IN ARREST OF JUDGMENT OUGHT TO HAVE BEEN GRANTED UPON THE GROUNDS OF UNCERTAINTY.

Specification of Error No. 3. The District Court erred when it denied Appellant's Motion in Arrest of Judgment with respect to Count Five of the Indictment.

The Sixth Amendment to the United States Constitution requires that the accused be informed of the nature and cause of the accusation. The Fifth Amendment prohibits subjecting any person to double punishment for the same offense. The legal sufficiency of the charging document may be tested before trial

by Demurrer or Motion to Quash and after verdict by Motion in Arrest of Judgment.

Rosen v. United States, 161 U.S. 29, 40 L. Ed. 606, 609.

The recitations in Count Five of the Indictment which set forth the formation of the conspiracy refer to no other clause for certainty as to meaning and particularly do these recitations fail to incorporate by reference the clauses that set forth the overt acts.

Joplin Mercantile Co. v. United States, 236 U.S. 531, 59 L.Ed. 705, 707;

Hyde v. United States, 225 U.S. 347, 32 Sup. Ct. 793, 56 L.Ed. 1114;

Anderson v. United States, 260 Fed. 557.

Total failure to allege a time in the Indictment precludes Appellant from raising the plea of autrefois conviction in the event that he be subsequently indicted for conspiracy on a charge originating from his activities on or about March 7, 1953.

Jarl v. United States, 19 Fed. 2d 891, 892.

To be distinguished, are cases like *Fisher v. United States,* 2 Fed. 2d 843, which improperly cite *Hyde v. United States,* supra, 225 U.S. 347, 32 Sup. Ct. 793, 56 L. Ed. 1114 and *Joplin Mercantile Co. v. United States,* supra, 236 U.S. 531, 59 L.Ed. 705, 707, as authority for the proposition that the overt acts are legally incorporated by reference into the charging language describing the acts constituting the conspiracy even though there is in fact no language of incorporation.

Likewise distinguishable from this Indictment are the situations to be found in the following cases:

(1) *Woitte v. United States,* 19 Fed. 2d 506, where the indictment charged a conspiracy "at a time and place to the grand jurors unknown."

(2) *Rubio v. United States,* 22 Fed. 2d 766, where the indictment was in the same form as in *Woitte v. United States,* supra, 19 Fed. 2d 506, except that there was also the date "January 1, 1924, the exact time", etc.

(3) *Parmagini v. United States,* 42 Fed. 2d 721, where the indictment read "that the parties conspired at a time and place to the grand jurors unknown".

(4) *Fiddelke v. United States,* 47 Fed. 2d 751, where the indictment read "on or about June 25, 1930".

(5) *Heskett v. United States,* 58 Fed. 2d 897, where the indictment read "prior to the dates of the commission of the overt acts hereinafter set forth, and continuing thereafter to and including the date of the finding and presentation of this indictment."

Appellant's Motion in Arrest of Judgment as to Count Five of the Indictment ought to have been granted on grounds of uncertainty.

3. THE CORPUS DELICTI WAS NOT ESTABLISHED EITHER BY DIRECT OR CIRCUMSTANTIAL EVIDENCE AS TO COUNTS THREE AND FOUR OF THE INDICTMENT.

Specification of Error No. 4. The District Court erred when it denied Motions to Acquit Appellant of Counts Three and Four of the Indictment.

Specification of Error No. 5. The District Court erred when it denied Appellant's Motions for New Trial and Arrest of Judgment with respect to Counts Three and Four.

There is an entire absence of direct evidence, the only circumstantial evidence being an unqualified inferential opinion by Brown that heroin was transferred by Appellant to Brown on January 18, 1952, as charged in Counts Three and Four of the Indictment.

Opinion evidence in Courts of the State of California is admissible if Section 1870, Subdivisions 9 and 10, Code of Civil Procedure are strictly followed. Opinion evidence by an unqualified witness upon a question of science, such as whether or not a given object is heroin should never be admissible in a criminal action, particularly where such an issue of fact is doubtful and one that the jury must ultimately determine.

Union Pacific Railway Co. v. O'Brien, 16 S. Ct. 618, 161 U.S. 451, 40 L. Ed. 766;

Pennsylvania Railroad Co. v. Chamberlain, 53 S. Ct. 391, 288 U. S. 333, 77 L. Ed. 819;

Wesson v. United States, 164 Fed. 2d 50;

Simmons v. United States, 206 Fed. 2d 427.

No testimony was received from an expert user of narcotics that he was familiar with symptoms from long usage and that from the use of this particular narcotic a given series of symptoms were observed, nor was there testimony proffered against Appellant by the Government from an unfamiliar user as to symptoms observed followed by competent medical testimony that a narcotic was in fact used.

Banks v. United States, 147 Fed. 2d 628;
People v. Candalaria, 121 Cal. App. 2d 686;
People v. Tipton, 124 Cal. App. 2d 213.

Appellant's conviction on Counts Three and Four must necessarily be the result of compounding one inference upon another inference where the latter inference is entirely unsupported by competent evidence.

United States v. Gulotta, 29 F. Supp. 947, 950;
Leach v. Board of Dental Examiners, 87 Cal. App. 207, 208.

Appellant's Motions to Acquit and Motions for New Trial of Counts Three and Four of the Indictment ought to have been granted upon the grounds of insufficiency of the evidence.

4. APPELLANT AND COUNSEL FOR APPELLANT RAISE NO ISSUES ON APPEAL WITH RESPECT TO APPELLANT'S CONVICTION AND SENTENCE UPON COUNT ONE OF THE INDICTMENT.

CONCLUSION.

The judgment of the District Court ought to be reversed with respect to Counts Three, Four and Five of the Indictment.

Dated, San Francisco, California,
December 15, 1954.

Respectfully submitted,
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